No. 2521.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Appellant,

vs.

JOSEPH CRAIG, WILLIAM A. BRADY, E. L. PHILLIPS, ARCHIBALD S. WHITE, C. L. PARMALEE, GEORGE H. HULL, JR., ROY M. PIKE, OAKLAND BANK OF SAVINGS, a Corporation, YOLO COUNTY CONSOLIDATED WATER COMPANY, a Corporation, CAPAY DITCH COMPANY, a Corporation, YOLO WATER & POWER COMPANY, a Corporation, and WHITE & COMPANY, a common name under which more than two persons are associated in business and transact such business,

Appellees.

BRIEF OF APPELLANT.

CHARLES S. WHEELER and
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Of Counsel.

Filed this.....day of March, 1915.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

THE JAMES H. BARRY CO

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PRELIMINARY STATEMENT OF FACTS.

The Bill in this action was dismissed for alleged want of jurisdiction, the ground being that the suit is brought to recover upon a chose in action for which appellant's assignor could not have sued in the Federal Courts (Tr., p. 95).

The purpose of the action is to obtain various forms of equitable relief: among other matters, to establish a constructive trust in a large amount of real and personal property, including contracts for water rights; and to compel the conveyance thereof to appellant; to remove a cloud upon appellant's title created by a trust deed given to secure a bonded indebtedness; to have it adjudged that because of the fraudulent conduct of certain of the appellees, the appellant has a right to condemn certain lands, which right is superior to the right of defendant Yolo Water and Power Company; to enjoin the further prosecution of a condemnation suit now pending in the State Court; to enjoin the use of waters to which appellant is entitled; for the ascertainment and determination of the extent of the rights of certain defendants to the use of waters; for a decree permitting the joint use by appellant with defendant Yolo County Consolidated Water Company of certain ditches and canals (Tr., pp. 87-93).

The bill proceeds upon the theory that the Federal Court as a court of equity, having obtained jurisdic-

tion of the action for at least one or more of the purposes above indicated, will draw unto itself jurisdiction over all of the matters embraced in the bill, in order to finally dispose of the controversy and avoid a multiplicity of suits. And so it is immaterial that there may be some matters stated in the Bill which if standing alone would have debarred the jurisdiction. The following quotation illustrates this principle as applied to suits in which, among other matters, assignments of choses in action are involved:

> "The remaining ground of objection is that the court is without jurisdiction 'in respect to any of the water leases or contracts except the one option contract made directly with the complainant.' This objection rests upon the statutory limitation against suit by the assignee of a chose in action for its enforcement unless suable as well by the assignor in the Federal court, and upon the authorities holding bills for specific performance of contracts to be within such limitation. If it be assumed, however, that the rights derived through Mr. Clark are choses in action, and cannot confer jurisdiction, nevertheless the presentation of the jurisdictional cause—as thus rightly conceded to appear—*would save the right to Federal jurisdiction, and bring within equitable cognizance all the other matters referred to as branches of the controversy, saving multiplicity of suits. The statute is not then applicable when jurisdiction attaches for such cause well stated.*"

Howe & Davidson v. *Haughan,* 140 Fed., 182.

This, of course, is but an application of a general principle (*Pomeroy's Equity Jurisprudence,* Vol. 1, Sec. 181).

STATEMENT OF FACTS.

Put forth with such brevity as is consistent with the scope of the bill, the principal facts are as follows:

Clear Lake is a lake 22 miles long and eight miles wide, situated 1325 feet above sea level. Its outlet is through Cache Creek, which empties into the Sacramento River near Woodland. There is a great quantity of flood or waste water which could be stored in the lake by erecting a dam at the outlet. If the stored water were conducted toward the Sacramento Valley and properly utilized on its way, it would afford a large amount of electric power; and after being so used, thousands of acres of thirsty soil could then be irrigated by it (Tr., pp. 5-6).

This attractive situation brought about the incorporation in 1906 of three companies, which for convenience we will call the Allied Corporations. One—the Central Counties Land Company—was to buy up and own all of the land fronting upon the lake. Another—the California Industrial Company—was to own all of the riparian rights in the lake and was to be able to flood and overflow the lake shores to a desired level of ten feet. It was to sell the use of the stored water to the Central California Power Company,—the third corporation—which was to utilize it for generating electricity. After leaving the power plant the water was then to be devoted to irrigation (Tr., pp. 7-8).

But this was not all. For the purpose of utilizing the water for irrigation, said corporations were acting in cooperation with one Vandercook, who held a contract for the purchase of the stock of the Yolo County Consolidated Water Company. This latter corporation owned many miles of canal and irrigation ditches in Yolo County, and also rights in the natural flow of Cache Creek (Tr., pp. 9-19).

Under Vandercook's agreement with his vendors, the stock so to be purchased by him was placed in escrow with the California Safe Deposit & Trust Company to be by it delivered to Vandercook or his assigns in accordance with the terms of the agreement of purchase (Tr., p. 11).

The three Allied Corporations went ahead with the project, and between 1906 and June 1st, 1911, had purchased much property and performed much work and had laid out on the enterprise about One Million Dollars in cash (Tr., p. 9).

Vandercook by the last-named date had paid out on account of the purchase price of the stock above referred to, between One Hundred Thousand and Two Hundred Thousand Dollars (Tr., pp. 19-21).

A merger of the three Allied Corporations and Vandercook's interest was arranged. A corporation was organized for the purpose and, by mutual consent of the stockholders in the Allied Corporations, business was transacted in its name—the Central Counties Land

Company, however, bearing the principal expense (Tr., pp. 25-31).

The merger was in process of completion in June, 1911. While matters were in this shape, and the assets of the Allied Corporations so to be merged were of great actual and potential value, it became evident that more capital must be brought into the enterprise, or it would fail (Tr., p. 32).

Therefore, the Central Counties Land Company sent an agent to New York to interest Capital. A New York broker was also employed to aid in the matter. This agent and the broker took the matter up with Appellee White & Company. Maps and engineers' reports were laid before White & Company. They were interested, and by October 15, 1911, notified the Central Counties Land Company that they would go into the project; also that the funds were all arranged and that one of their associates would leave for California by the 28th of October, 1911, to inspect the property (Tr., pp. 35-36).

THE CONSPIRACY.

At this point one Joseph Craig begins to occupy the center of the stage. He was a large stockholder in the company which owned the canals in Yolo County and was one of those who had agreed to sell to Vandercook. He was also one of the Directors of the Central Counties Land Company. He had access to all the correspondence relating to the deal with White

& Company, and knew that matters had progressed to the point just noted. He conceived that he would make money by secretly arranging with White & Company to wreck the corporation of which he was a trustee. He got in touch with White & Company. They joined with Craig in a conspiracy to bring about a cancellation of the Vandercook agreement so that the said merger might be prevented, and the stock of the canal owning company might be turned over to White & Company at a large profit to him and to themselves; and they further conspired together to wreck and ruin the Central Counties Land Company, of which Craig was a director, and to acquire its project and properties at a trifling cost to themselves. The conspiracy was put into operation (Tr., pp. 37-40).

The Appellee Yolo Water and Power Company was organized as an agency to carry out the conspiracy. Craig, in furtherance of the conspiracy, procured the vendors of the stock of the canal owning corporation, notwithstanding the existence of the Vandercook agreement, to agree to sell the same stock to him, and then Craig transferred said last-named agreement to the said Yolo Water and Power Company (Tr., p. 42).

The next step taken by the conspirators was to cause service upon Vandercook of a notice calling upon him to pay over half a million dollars by March 24, 1912, or suffer a cancellation of his agreement for the pur-

chase of said stock (Tr., pp. 49-53). This they did, notwithstanding the fact that they well knew that the sum demanded was not and would not be due. Craig, the unfaithful director and trustee, was one of those who signed and made the demand (Tr., p. 55). On March 26, 1912, the certificates of stock covered by the Vandercook agreement and which had been delivered in escrow to the California Safe Deposit & Trust Co., were, without right, withdrawn by Craig from the Receiver of that defunct concern and turned over to the said Yolo Water and Power Company (Tr., p. 55).

Meanwhile, the conspirators were also busy about the lands of the Allied Corporations. They all knew, and the said Yolo Water and Power Company knew, that several properties essential to said enterprise owned by Central Counties Land Company were under mortgage to divers persons and that the mortgages were in the form of deeds absolute. They procured the respective mortgagees to execute conveyances of said lands to said Yolo Water and Power Company. On one of these parcels of land is situated the dam-site essential to the control of the lake (Tr., p. 43).

Even before the stock covered by the Vandercook agreement had been taken from the escrow holder, the conspirators issued to themselves the stock of their said Yolo Water and Power Company, in consideration of the said deeds so procured by them to said properties which in truth belonged not to them but

to the Allied Corporations, and also in consideration of the assignment of Craig's said fraudulent contract to deliver the stock already covered by the Vandercook agreement. They then caused bonds to be issued by said Yolo Water and Power Company and a deed of trust purporting to secure the same to be executed, which deed of trust covers said lands so belonging to said Allied Corporations. Said deed of trust is a cloud on the title thereto (Tr., pp. 45-46).

As previously planned, the conspirators had their corporation bring condemnation suits covering lands which Craig and others held in trust for said Central Counties Land Company, and also covering all other lands fronting on the lake which were owned by the Allied Corporations (Tr., p. 58). These suits have not been pushed, but, as intended, serve merely to cloud the title to these lands, thereby tying appellant's hands. The conspirators also fraudulently procured an agent of the Allied Corporations to take a new contract in his own name on some important lands on which the Allied Corporations had long had a contract. In this new contract the vendor, supposing he was dealing with the Allied Corporations, put the purchase price at an amount which represented only the balance remaining unpaid under the former contract. This agent has since transferred the contract so procured by him to the conspirators' corporation. In this way, the conspirators got the land by paying $23,000 less than its value (Tr., p. 63).

Said conspirators have gone upon the Spring Valley Ranch, which now belongs to appellant, and have posted a notice of water appropriation (Tr., p. 65). Under this, they claim adversely to the prior appropriations made by the grantors of and now held by appellant (Tr., p. 76).

They have acquired lands fronting on the lake essential to the said plans of the Allied Corporations and of the appellant, its successor in interest.

They have adopted for themselves the plan of the Allied Corporations to sell water rights for irrigation purposes and have procured contracts which, when water can be delivered under them, will net $1,000,000 (Tr., p. 71).

The conspirators have succeeded in their scheme so far as wrecking the merger and the Allied Corporations is concerned (Tr., p. 72). The bill points out that the Craig conspiracy was a fraud not only on the Allied Corporations but on the creditors of said corporations as well. Appellant corporation was organized by creditors of the said Allied Corporations, whose claims amounted to some $700,000. All of the properties and assets of the Allied Corporations have been transferred and conveyed to appellant.

Notwithstanding the many vicissitudes and losses brought about by said conspiracy, appellant still owns and holds more than 7,000 acres of land bordering upon or overflowed by Clear Lake (Tr., p. 77). It owns and controls more than half the frontage on the

lake (Tr., p. 76). It owns and holds the water appropriations on which it and its predecessors have expended over $105,000, and these appropriations are the first in right and give it priority on the lake (Tr., p. 76-77).

Craig was at all times a director and trustee of the Central Counties Land Company and his co-conspirators all along knew of this fact and of the fiduciary relation in which he stood (Tr., p. 38). They, as well as Craig, have received large sums of money and shares of stock and bonds as their share of the profits of the fraudulent deal (Tr., pp. 57-58).

A discovery will be necessary to ascertain the amount of these ill-gotten gains.

Appellant wants to go ahead with the enterprise. It seeks to remove the clouds on its title created by the conspirators. It asks to have the conspirators and their agency, the Yolo Water and Power Company, adjudged to be constructive trustees of what they have fraudulently obtained. It wants, moreover, to have equity say that it has a right to condemn the necessary lands on the lake which is superior to the right of the conspirators and their said corporate agency. It wishes the priority of its rights to the appropriated waters of the lake to be adjudged, and it wishes the extent of certain admitted rights of Yolo County Consolidated Water Company in the natural flow of Cache Creek to be admeasured and asks that any use in excess thereof be enjoined. As appellant has the

right to the waters, the conspirators cannot make good their contracts to deliver water under the water rights contracted for (Tr., pp. 71 and 79). These depend on storage in the lake. Appellant asks to be adjudged to be equitably entitled to the said contracts, and in order to deliver water under them, it asks for a decree giving it a joint use of certain ditches and canals now controlled by defendants because of the fraudulent cancellation of the Vandercook agreement (Tr., pp. 91-92).

Many other facts are alleged and other relief is asked for, but enough has been said to give a fair idea of the scope of the bill.

APPELLANT DOES NOT SUE TO RECOVER UPON A CHOSE IN ACTION.

The sole question here is simply this: Is appellant to be deemed merely the assignee of choses in action? And is this bill so framed that for jurisdictional purposes the suit must be deemed a mere suit to recover on a chose in action?

The answer is obvious. Never before has the present statute (Judicial Code, Sec. 24) or any of its predecessors (Stats. of 1789-1887-1888) been held to include within the designation "choses in action," claims such as are in suit here.

Repeated decisions have from the first confined said phrase to suits arising on contracts. It never has been supposed to include suits to establish constructive trusts

arising out of fraudulent transactions and conspiracies; nor suits to remove clouds from title, and the like.

On the contrary, it has been directly held that suits of the latter character are within the jurisdiction whenever the proper diversity of citizenship exists.

A case directly in point and quite similar in some respects to the case at bar is *Gest* v. *Packwood,* 39 Fed., 525, 537, which was decided in this Circuit in 1889. In that case it appeared among many other matters that one Carter and one Packwood had wrongfully obtained a sheriff's deed to certain real property which in equity belonged to one Rice and to the firm of Clark, Layton & Company. Thereafter, one Gest, the plaintiff, succeeded by mesne conveyances to the interest of the said Rice and the said firm. He brought suit against Carter and Packwood "for an accounting, and a conveyance of the legal title to the property wrongfully obtained by them from the sheriff" (p. 528). The Court said when the same objection to the jurisdiction was made that is made in the case at bar:

> "It is now objected that the plaintiff is simply the last assignee of a contract or contracts for the title to, or interest in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. . . .
>
> ". . . the bill alleges that since May 4, 1874, the plaintiff Gest, 'by a regular chain of conveyances and assignments,' has acquired 'all the right, title, and interest' which Rice, and Clark, Layton & Co. then had in said property, or the rents, issues, and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrong-

fully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property, and not the mere assignment of a right of action thereabout.*"

Gest v. *Packwood, supra.*

Another more recent case is *Commonwealth S. S. Co.* v. *Am. Shipbuilding Co.,* 197 Fed., 780, 785, where the Court uses this language:

"The complainant's right to rescind the contract is not based on any contract rights transferred to it by the Hawgoods, *but the bills in their entirety proceed upon the theory that the rights of action exist in the complainant by reason of the fraud of the Hawgoods and the defendant.*

". . . The complainant makes no claim that it is the assignee of the Hawgoods. They allege that the Hawgoods were the trustees and merely held the legal title, and they rely on no cause of action which the Howgoods had or might claim they had at any time. The complainant is not relying on the right of the Hawgoods, *but upon the fraud of the Hawgoods and the defendant.*"

It has also often been held by the Federal Courts that conveyances of real property are not choses in action and that suits based upon the title conveyed by such deeds are not "suits to recover on choses in action" within the meaning of the statute. For example:

"Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon either. *It is founded upon a conveyance of a title to land,* good (as far as appears) by the *lex loci situs. . . . The words, then, of the exception do not apply to the case.*

It is a case within the general descriptive words as to suitors, founding the jurisdiction of the circuit court."

Briggs v. *French,* 4 Fed. Cas., 119.

Similarly, it was said in *Sheldon* v. *Sill,* 8 How., 449, 450:

"The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. The term *'chose in action'* is one of comprehensive import. . . . It is true, a *deed of title for land does not come within this description."*

"A conveyance of land is not a chose in action. . . . That the statute acts upon negotiable paper is clear. . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted."*

Dundas v. *Bowler,* 8 Fed. Cas., 26.

"The conveyance by the marshal under the receivership proceedings . . . can hardly be considered merely as an assignment of the original contract under which the plant was erected. *It was a conveyance of real estate.* . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."

Portage City Water Co. v. *City of Portage,* 102 Fed., 769, 774.

"The bill states the complainant to be a citizen and resident of the State of Alabama, and the defendants to be citizens and residents of the State of Ohio. It has not been alleged, *and certainly cannot be alleged, that a citizen of one State having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie;* consequently,

the single inquiry must be whether the conveyance from M'Arthur to M'Donald was real or fictitious."

M'Donald v. *Smalley,* 1 Peters, 623.

The bill in the suit at bar counts upon some legal titles as well as upon some equitable titles:

It would make no difference, however, as already seen, if all of the titles were only equitable. We have quoted, *supra,* from *Gest* v. *Packwood,* 39 Fed., 525, 537, which was a case based on an equitable title. In the said case it is said:

"A sale and conveyance of the property to Gest under such circumstances, or of all the right, title, and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property, and not the mere assignment of a right of action thereabout. Manning* v. *Hayden,* 5 Sawy., 363; 1 *Perry, Trusts,* Sec. *227.* This author says:

"'The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised.'"

As stated at the outset, the Courts have again and again laid it down that the phrase "chose in action" as employed in the statute must be confined exclusively to cases arising on contract.

A characteristic expression to that effect is the following:

"We are of opinion that this clause of the statute . . . applies to cases only in which the suit is brought to recover the contents or to enforce the contract **contained in the instrument assigned."**

Deshler v. *Dodge,* 16 How., 622.

Again, in *Ambler* v. *Eppinger,* 137 U. S., 482, it is said that the excepted suits *"must be such as arise on contracts of the original parties."*

To the same effect is the following:

> "Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. . . . And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, *but rights of action founded on contracts which contain within themselves some promise or duty to be performed.*"
>
> *"And this view of the restriction seems to be warranted* by the consideration of the mischief which it was intended to prevent."

Bushnell v. *Kennedy,* 9 Wall., 387, 391-2.

See also:

Commonwealth S. S. Co. v. *Am. Shipbuilding Co.,* 197 Fed., 785-6;
Simons v. *Ypsilanti Paper Co.,* 33 Fed., 193;
Buckingham v. *Drake,* 112 Fed., 260;
Corbin v. *County of Black Hawk,* 105 U. S., 665.

Many other cases holding similarly might be cited.

It must therefore be considered as definitely settled that in the absence of a contract, there can never be said to be a *chose in action* in the sense in which the statute uses that phrase. The statute ousts the juris-

diction only when the complaint alleges that an existing contract is in some way broken or violated.

While of no consequence here, it may avoid confusion if we point out before closing, that Sec. 24 of the Judicial Code means by the phrase *chose in action* exactly what was meant by the same phrase in the Judiciary Act of 1789 and the statutes of 1887 and 1888.

The language in the Judicial Code differs slightly from that of the earlier acts, but the change was obviously made to meet repeated judicial criticisms. The courts had again and again said that the words in the earlier statutes "were not happily chosen" to convey the intended meaning and could not, therefore, be "taken in an absolutely literal sense."

> *Bushnell* v. *Kennedy,* 9 Wall., 391, 392;
> *Shoecraft* v. *Bloxham,* 124 U. S., 730.

See also:

> *Commonwealth S. S. Co.* v. *American, etc. Co.,* 197 Fed., 785, and cases cited therein.

Section 24 of the Judicial Code reads as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court

to recover upon said note or other chose in action if no assignment had been made."

Sec. 24, *Judicial Code,* subd. 1.

Where the earlier statutes read "suit to recover the *contents* of any promissory note or other chose in action," the Code says, "suit to recover *upon* any promissory note or other chose in action"; and later on where the earlier acts say, "unless such suit might have been prosecuted *to recover such contents,*" the Code says, "to recover *upon* said note or other chose in action."

A suit is brought *upon* a promissory note when it is brought to enforce the promise contained within the note, and this is precisely what the courts have interpreted the earlier statutes to mean. The word contents was "designed to embrace the rights the instrument conferred which were capable of enforcement by suit (*Shoecraft* v. *Bloxham,* 124 U. S., 735). The use of the words "contents of a" were "not happily chosen to convey this meaning," (*ib.*) and hence the change in the Code to the words "upon any," which carry the said intent in a more satisfactory way.

In view of what is above noted, no one would be justified in supposing that Congress intended to do anything else than to express this meaning when they came to codify this provision. Congress, however,

saw fit to put the matter beyond debate by incorporating the following section into the code itself:

> "The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."
>
> Sec. 294, *Judicial Code.*

We ask the Court's attention to one further consideration: We have said above that in no event is the matter of any consequence here. This is because the bill is based upon legal titles and also upon equitable estates which are not "choses in action," even if that phrase were now given a meaning by the courts far wider than ever given to it in the decided cases. In short, appellants' rights answer to no possible definition of a chose in action. But even if by some process of legal hermeneutics, unknown to us, the Court found itself able to say that plaintiff's claims are choses in action as the term is now used in the Judicial Code, nevertheless, we would not be affected by that circumstance, because the jurisdiction in this case must be determined not by the Judicial Code, but by the Statute of 1888. This follows from Sec. 299 of the Judicial Code, which declares

> "The repeal of existing laws . . . embraced in this Act *shall not affect any act done or right accruing or accrued* . . . ; but all . . . suits and proceedings for causes arising or acts done prior to such date" (i. e.

Jan. 1st, 1911) "may be *commenced* and *prosecuted* within the same time and *with the same effect* as if said repeal . . . had not been made."

Interpreting the foregoing clause, the Federal Courts have said:

"This section saves to the Federal Courts jurisdiction, not only of pending actions, but of causes of action which accrued prior to January 1st, 1912. *Lincoln* v. *Robinson* (D. C.), 194 Fed., 571; *Taylor* v. *Midland Valley R. Co.* (D. C.), 197 Fed., 323; *Dallyn* v. *Brady* (D. C.), 197 Fed., 494."

McKernan v. *North River Ins. Co.,* 206 Fed., 984, 986.

"What is now insisted upon by the motion to remand is, in effect, that the words 'causes arising or acts done prior to such date' shall be entirely eliminated, for no other effect can be given to these words except that causes which arose prior to January 1, 1912, although not yet sued on, still remain within the jurisdiction of the national courts, as if no change in the law had been made. If the intention of Congress by the enactment of Sec. 299 had been merely to save suits then pending, is it not reasonable to suppose that similar language would have been used as in subdivision 20 of section 24, and the words 'shall not affect any right accruing or accrued,' and again, 'any act done or right accruing or accrued before the taking effect of this act,' found in Sec. 299, omitted?"

Wells v. *Russellville, etc. Co.,* 206 Fed., 528.

In the case at bar, the conspiracy charged was inaugurated and had begun its operations in the fall of 1911 (Tr., pp. 37-40)—more than two months prior to January 1, 1912—the date on which the Judicial Code went into effect. Some of the rights of plaintiff

had "accrued" when the act went into effect. Others of the rights asserted are based upon acts subsequently performed; but all were in furtherance of the conspiracy, and the said rights were at least "accruing" on January 1, 1912. Whether "accrued" or "accruing" the jurisdiction would be saved by the provision above noted, even if the (to us) impossible meaning above suggested were placed upon section 24 of the Judicial Code.

But we beg again to repeat that Sec. 24 is but a codification of the earlier provisions.

In the case at bar the requisite citizenship exists. There is no contract which appellant is seeking to enforce; nor is it seeking to recover for a breach of any contract. Its director and trustee Craig has in violation of his fiduciary obligations entered into a conspiracy with White & Company to defraud both its predecessors in interest and itself. In pursuance of this conspiracy, Craig and White & Company, through their agency, the Yolo Water and Power Company, have obtained the legal title to certain properties and have initiated certain rights. These titles and rights they should, upon the allegations of the bill, be adjudged to hold as constructive trustees for appellant. They have, moreover, created a cloud upon the title of appellant to other real estate to which appellant now holds the legal title. The requisite diversity of citizenship is alleged. There is nothing in the bill,

therefore, to suggest that the case does not fall within the jurisdiction of the Federal Courts.

Appellant accordingly asks that the decree be reversed.

Respectfully submitted.

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